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ABSTRACT

Until recently, the name commonly given to the relationship between the college and its students was in loco parentis, a concept that today is completely outdated. Due process of law has replaced it and many feel that its advantages are great. There are many disadvantages, however. (1) The literal adoption of legal processes from "the outside world" may aggravate, rather than ease, the spirit of alienation and distemper on campus. (2) There is grave doubt that reliance on the courts and the police will prove effective in the long run--students are very inventive. (3) A literal translation of due process to academia may well mean an extraordinarily expensive and lengthy series of trials and appeals, with resulting overextension and exhaustion of resources. (4) The introduction of outside law enforcement could mean an abandonment of the campus' own code of conduct. The law is of limited use in interpersonal relationships, and, assuming that teaching and learning are still involved in such relationships, legal solutions to campus problems should be sought only when the life of the community is in great danger. (AF)

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DUE PROCESS: POSSIBLE DANGERS AND ADVANTAGES OF EXTENSION OF USE OF DUE PROCESS AND OFF-CAMPUS LEGAL MACHINERY*

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The phrase "nor shall any State deprive any person of life, liberty, or property, without due process of law" appears in the Fourteenth Amendment to the Constitution of the United States, in a paragraph heavily freighted with potent statements of the rights of American citizens. Some parts of the Fourteenth Amendment--and the due process clause is one of these--have in the time since the passage of the amendment become very nearly sacred prescriptions for the cure of social ills, or, in other settings, slogans to be employed in bitter political conflicts. Considered dispassionately, "due process of law" is a phrase that rings reassuringly true; it connotes an impartial, judicially enforced democracy, and a spirit of inexorable and uncorrupted justice. Due process of law, or something very much like it, has ancient origins in the repertory of human rights; and as a human right, we tend to recommend due process without reservation, and to expect it to act as a beneficial and invariably desirable influence in every new situation in which it may be applicable.

I have the heretical, and perhaps seditious impression, however, that for all its evident value due process of law (and all that goes with it) may in the setting of educational institutions prove to be a crude and inept instrument for solving community problems, an influence as often malignant as benign.

The part of the law which regulates social procedures--particularly how we go about settling disputes amongst individuals and groups--undoubtedly becomes increasingly important as the population becomes more numerous and congested, and human activity at the time becomes more varied and intricate. Our reliance upon the rigidity and impartiality of the law increases as the communities and organizations we belong to become too large and complex to be ruled by informal persuasion and the unstated sanctions which arise from closely interwoven loyalties, camaraderie, and group mores. Each of us can remember a not-too-distant time when American colleges and universities were sufficiently small, and the prevailing code of behavior was sufficiently clear and powerful, that virtually every disciplinary problem and dispute could be resolved in secrecy and awful silence behind a closed door in the dean's office.

The name commonly given to the relationship between the college and its students in that time was in loco parentis--a name suggesting among other things a situation in which each individual has an identity known to those about him, and in which personal needs and idiosyncrasies are taken into account. In loco parentis may have been a workable policy at Harvard in 1850, at Michigan in 1910, and at Washington State College just before the Second World War. But it is absurd to characterize the officers and faculty of an institution such as present-day Minnesota as parental, or to view the tens of thousands of students as just an extraordinarily large family of children. Institutional size alone would have

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confounded in loco parentis if the spirit of the times had not killed it first.

We have only lately divested oursevles of the doctrine and practices of in loco parentis--a doctrine which we faulted for its authoritarian and condescending aspects, but which did, for all that, have a strong admixture of familial trust and concern. In place of the old informal, inexact, and sometimes inequitable processes through which we once settled campus grievances, we have fallen back--often suddenly and in great desperation--upon the law of the land. Instead of the arbitrary and maidenish contrivings of the dean of women, we have adopted due process of law as hammered out in the criminal courts of the United States. The advantages of this change are thought to be great. Upon first consideration, after all, it seems that the law brought peace to places such an San Francisco State College, where suasion by administrative officers and faculty members failed utterly. The disadvantages if importing the legal machinery entire into the academy seem particularly ominous to me, however, and I should like to point out some ways, ranging from the practical to the philosophical, in which the new legalism may prove a curse rather than a boon.

First, the literal adaptation of legal processes from "the outside world" may simply aggravate, rather than ease, the spirit of alienation and distemper on campus. What the law provides is a limited array of really quite arbitrary remedies for social problems. These remedies are intended for use only after the parties have passed beyond hope of friendly agreement, compromise, or rational persuasion. Persons who resort to litigation should note, with appropriately solemn thoughts, that lawyers typically do not provide any post-judgment therapy in the way doctors provide counsel and therapy after surgery; it is assumed that there will be no reconciliation, no rapprochement, between the parties. Formal litigation is an essentially hostile and destructive process, and we must assume that the parties will be forever alienated.

This abrupt antagonistic process contravenes much of what might be considered the life styles of American college campuses. Even now the atmosphere of the campus, if not precisely familial, is expected to be a democratic, communicative one, where controversy gives way ultimately to a consensus produced by rational discussions and an essential attitude of respect for other persons. All of this may sound rather hollow, I'll admit, to those with vivid memories of the ruined interiors of occupied administration buildings. But it seems to me that our academic style still presupposes a substantial degree of amicable mutual interest and the esteem of individual for individual. Arrests and litigation will surely destroy this benign milieu, and if the teaching and learning process survives in these instances it will survive as an icily detached exercise at best, an extension of the adversary proceedings at worst.

In American higher education we have until now relied heavily upon the unwritten doctrine that teaching and learning involve close relationships among students and among students and professors--relationships which are in a special way quite personal and intense. Significantly, where the size and impersonality of institutions have negated these relationships to any substantial degree, students have responded critically and sometimes violently. The ready employment of impersonal legal processes on the campus seems bound to hasten the dissolution of any remaining sense of campus community.

I ground my second criticism of the reliance on courts and the police (both external and internal) on my doubt that these legal resources will prove effective in the long run. I grant that in many individual situations, particularly those

which have arisen during the past two years, a resort to the law was absolutely necessary to preserve property and restore peace. The law is a part of the larger mechanism which the student culture (or the active element thereof) has chosen to abhor, however, and to enforce laws which the society has ceased to value is an expensive and exhausting enterprise if it is to continue for a long period of time. In all likelihood students will become more inventive in finding ways to evade, negate, and confuse the law, and even more willing than they now are to protect their peers who have committed the misdemeanors and felonies included in the repertory of campus activism. It is only as we find new bases for broad and active consensus that rule enforcement on campus will become anything less than a pitched battle.

My next concern also related to the overextension and exhaustion of resources--this time the psyc hological and temporal resources expended in the sort of litigation which employs elaborate procedure. On most campuses we have come a long way from the time when a dean conducted disciplinary hearings with a procedure of his own (sometimes rather peculiar) devising, and with the assurance that his decision would carry an almost Solomon-like finality. No doubt many student malefactors were not inspired to present their most effective cases under those circumstances, and quite probably that systems in which all power lay on the side of the college encouraged a frequent smothering of the rights of accused parties. We seem now to be on the threshold of quite a different system in which (in the name of due process) we establish in the administration building a court which employs all of the procedural intricacies, and all of the personnel, of the courts of record in the outside community.

This type of court and procedure is in many instances desirable and necessary, but its apparent efficacy in the community at large does not necessarily mean that the transfer to the college campus will bring about a good result. In the community at large, after all, litigation ordinarily involves only a very small fraction of the population. On some college and university campuses of late, large numbers of students have been enmeshed in disciplinary matters of one sort or another. A literal translation of due process to academia may well mean an extraordinarily expensive and lengthy series of trials and appeals, in which, inevitably, subpoenaed witnesses, court reporters, lawyers, and law-trained judges must make their appearance. If we can serve the spirit of due process on campus without adopting literally every turn and nuance of criminal process and procedure, we will have saved a great deal of time, money, and--to hearken back to the earlier part of this paper--anger and alienation.

The college need not choose to refine and reform its own procedures for adjudicating disputes of course. In instances in which infractions of campus rules also constitute violations of state criminal and civil codes, college officers have repeatedly turned to extamural law enforcement agencies in recent months--sometimes in the intangible form of an injunction, but more often quite corporeally in the person of police officers. The introduction of outside law enforcement agencies almost invariably results in trials held in courts outside the boundaries of the campus. Quite conceivably, a college could turn entirely to outside law enforcement for the resolution of campus disciplinary problems. This would mean, presumably, an abandonment of the campus's own code of conduct, placing in its stead a free and regular enforcement of the lasw of the community and state.

Such an arrangement does not sound particularly novel at the outset, especially to anyone making the naive assumption that the law of the land is enforced everywhere the same. In truth, of course, American college campuses have existed for

centuries as enclaves in which--perhaps because of the presumed fragility and obscurity of the academic process--presidents and professors and students were permitted to work out their own sets of laws and punishments without vulgar intrusions by the local constabulary. What Judy on Factory Avenue could not do without receiving a fine or thirty days in jail, Judy on Sorority Row might accomplish with only an unpublicized probation period and a couple of soulful lectures from the dean of women.

The loss of student immunity from the harsh mills of the law is perhaps not the greatest, or even an important, disadvantage of opening the campus to local law enforcement agencies, however. I think it's not unduly pessimistic to suppose that once it becomes the custom for local police and local courts to participate in campus disciplinary problems, the power of administrators, professors, and students in these matters will inevitably wane, and an increasingly broad part of the spectrum of campus life will be determined by a community which is, to say the least, presently impatient with the obtuse ways of the academic household. Eventually, one imagines, certain limitations of academic prerogatives must occur.

The whole question of college law and process is a twisted and shifting one--primarily, I think, because the college as an institution lies in a peculiar never-never land. It is not, or at least is no longer, a private and closely held organization, such as a family, a club, or even a small business, in which lines of authority may be clearly and arbitrarily drawn, and dissenters may be punished without recourse (or in the instance of the club or business) expelled. On the other hand the college is not, as yet, really a polity such as a town, in which citizens deal with one another at arm's length, and may resort ot established judicial procedures for the settlement of serious disputes. Students of higher education of the sort who are possessed by dark Orwellian premonitions may see an unpleasant societal direction in the recent tendency to amke life on the college campus less like life in the family or clan, and more like life in the impersonal town. If we must resort to stringent judicial procedures to determine the rights of members of the campus community, it may be that in decades to come this same institutionalization may extend into smaller informal, and essentially intimate groups--not excluding the family. It will be a Stygian day when we come to rely upon injunctions and the intricacies of due process to arrange our personal relationships with one another.

I think such a dark prediction is extreme and at this point in our history absurd. It should point out, however, that the law is of limited use in interpersonal relationships, and supposing that teaching and learning still involve such relationships, legal solutions to campus problems should be sought only when the life of the community is <u>in extremis</u>.

In all of the foregoing I have attempted to avoid excursions into various technicalities of the law. It is important, however, to append two explanatory statements.

First, although numerous courts have examined the rectitude of challenged legal proceedings and set down decisions about due process of law, the law is not yet so circumscribed or certain that meeting the requirements of "due process" necessarily means following one particular set of procedures. The courts still probe for the essence and spirit of the proceedings, and it is for this reason that I retain hope that colleges and universities may be able to avoid adoption of certain cumbersome and psychologically destructive procedures.

Secondly, the Fourteenth Amendment to the Constitution presently applies only to state action--that is, the acts of public, rather than private, institutions. Thus private colleges need not, in theory, accord due process to students and faculty members embroiled in disputes. In such cases, certain contractual theories have been applied to protect the rights of the parties. There is some indication in recent case law that the Fourteenth Amendment may be extended to apply to the acts of private organizations in some instances. The legal questions are complex and well beyond the purview of this analysis.